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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No 428 MISC.

IN THE MATTER

OF

BENJAMIN LEVITAS, an Attorney,

Petitioner,

and

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT.

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The petitioner prays that a writ of certiorari issue to review the order of the Appellate Division of the Supreme Court of the State of New York, First Department and the order of dismissal by the Court of Appeals of the State of New York of the appeal taken by the petitioner herein from the said order of the Appellate Division of the Supreme Court of the State of New York, First Department.

Opinions Below

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department is reported in 281 App. Div. 511 and 120 N. Y. S. 2nd 840. The Court of Appeals of the State of New York in dismissing the appeal taken by the petitioner herein from the said order of the Appellate Division, rendered no opinion, but its determination is reported at 306 N. Y. 632. The proceedings originated in the Appellate Division, which referred the matter to an Official Referee to hear and report, together with his opinion. The Referee's report is not reported but the relevant portion is set forth in the Appendix. The record was not printed below and consists of the original typewritten pages.

Jurisdiction

The order of the Court of Appeals of the State of New York dismissing the appeal of the petitioner taken as of right on constitutional grounds, both Federal and State, was made and entered on November 20, 1953. The appeal that was dismissed was taken on June 22, 1953. The order of the Appellate Division severely censuring your petitioner was appealable as of right only if constitutional questions were involved. Your petitioner took such an appeal. The respondent moved to dismiss the appeal on the ground that no constitutional questions were involved. In opposition petitioner argued in the Court of Appeals in his brief that the First and Fourteenth Amendments of the United States Constitution were involved and that the petitioner was "found guilty of professional misconduct without due process of law and in denial of his rights of free speech in court and equal protection of the laws." The constitutional rights of the petitioner were first violated by the order of censure. Petitioner

raised the constitutional question immediately thereafter at the first opportunity. This court has taken jurisdiction on constitutional grounds, even though the Court below decided that there were no constitutional grounds where the decision of the lower Court is not based upon a fair or substantial basis. *Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36; *Broad River Power* v. *South Carolina*, 281 U. S. 537; *Davis* v. *Wechsler*, 263 U. S. 22.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Questions Presented

The Appellate Division of the Supreme Court of the State of New York severely censured petitioner on finding him guilty of professional misconduct. The questions are

(1) Whether the proceedings brought by the petitioner to remove judicial officers, as the Referee found, without "malice" and "solely due" to petitioner's "outraged feelings" constitutes professional misconduct.

(2) Whether the attorney can be found guilty of professional misconduct where there is no evidence to support a finding of guilt, and where no underlying finding of fact was made which would support the conclusion that your petitioner was guilty of professional misconduct in his office of attorney and counselor-at-law.

(3) Whether an attorney can be found guilty of professional misconduct of charges contained in a supplemental petition of the Bar Association when the notice of motion of the said Bar Association to reject the report of the Official Referee to whom its petition and supplemental petition was referred, only recited that its motion to reject was brought on the petition.

(4) Whether the constitutional rights of the petitioner herein have been violated by the orders sought to be reviewed, finding the petitioner guilty of professional misconduct and reciting that it was made on testimony and exhibits "offered" in evidence.

(5) If an attorney was found guilty of professional misconduct for bringing a perjury charge against an attorney who previously prepared the Singer Company's complaint to the Bar Association against petitioner, and a charge based on a violation of a statute against the building manager, was such finding error where the Referee found that they were brought "not with malice" but "solely due to the" petitioner's "outraged feelings", and which finding was not reversed by the Court.

(6) Whether the petitioner "should be protected", as provided in the Canon No. 1, especially where the complaining landlord was represented by a law firm whose senior member was previously the President of the respondent.

(7) Whether respondent, having been charged with abuse of process and having been found not guilty of that charge by the Referee, which finding was not reversed by the Appellate Division, could be found guilty by the Appellate Division of something unnamed that he was not charged with.

(8) Whether the contents of pleadings can be the basis of professional misconduct if they are drawn without "malice" and are the result of "outraged feelings".

(9) Whether the petitioner was found guilty of professional misconduct without due process of law and in denial of his rights of free speech in Court and equal protection of the laws.

Statement

Petitioner moved his law office into the Singer Building in May of 1937. The relationship between landlord and tenant was harmonious for many years until there developed a shortage in office space in the City of New York and the Singer Company, the landlord, tried to increase the rents until its schedule was 86% above the freeze date set by the Emergency Rent Laws of the State of New York. If the architect of the tower of the Singer Building had intended to construct a solarium out of each office, he could not have done a much different job. In 1939 the Singer Company, in order to prevent the petitioner from moving because he found the heat unbearable in his office during the summertime partially defaced its building and inserted a 12-inch intake and exhaust fan in one of the windows of the petitioner's office. The spark that set off the extended litigation was the change by the Singer Company of the electric current in the building from direct to alternating on August 7, 1948, which made the 12-inch fan in the petitioner's office useless. A 9-inch fan which has an area of about half of a 12-inch fan, but not having the intake feature, was connected up on September 28, 1948, after the hot season. The petitioner refused to pay his rent and interposed defenses and counterclaims to about 6 dispossess proceedings brought against him. The Singer Company was successful in all except one, dismissed without prejudice.

The Legislature of the State of New York was aware of the fact that landlords would reduce during the emergency the services that they gave to their tenants and the legislature therefore requires that each petition for the removal of a tenant plead and the landlord then prove "that the services furnished by the landlord to the tenant have not been unreasonably diminished since the effective date of the existing lease, rental agreement or tenancy."[1]

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[1] McKinney's Consolidated Laws of New York, Book 65, Part 2, Sub. 8526. Petitioner's Exhibit 2.

Below the respondent argued, in effect, that the reduction of a mere three inches in a fan was a trivial matter, as were all the other defenses that your petitioner interposed to the actions commenced by the Singer Company.

The rent increase that the Singer Company would have wanted above the 86%, if the petitioner herein wanted a fan three inches larger than 12″ and a proportionate trivial increase in its other services, would not have been trivial at all, even in the eyes of the respondent.

In all proceedings commenced by the Singer Company your petitioner appeared as attorney for himself.

The respondent commenced this proceeding on May 26, 1950 after complaint by the Singer Company by the service of a petition and notice of motion on your petitioner. The charge was abuse of process in interposing defenses in the proceedings commenced by the Singer Company. Until that date your petitioner did not issue any process or commence any proceeding. On June 1, 1950 your petitioner "outraged" as the referee found, obtained from a City Magistrate, after orally stating the facts to him, Magistrate's Court summonses and served one on Robert W. Crawford, charging him with violating Section 2040 of the Penal Law, a misdemeanor. Mr. Crawford was the manager of the Singer Building, where your petitioner was a tenant, and the complaint was that he shut off the refrigerated drinking water in the building on Saturdays, although regular hot and cold water was supplied. Your petitioner also served on William Philo Clark, an attorney associated with the attorneys for the Singer Company, and who was in charge of all the litigation against your petitioner, another Magistrate's Court summons, charging Mr. Clark with perjury. Magistrate Harry G. Andrews dismissed both charges on the return day on petitioner's opening statement which merely repeated in effect what he told the prior Magistrate who issued the summonses. That on September 19, 1950 your petitioner made a motion in the

Appellate Division of the Supreme Court, First Department, to remove Magistrate Harry G. Andrews because he dismissed the summonses against Crawford and Clark without making any investigation and because the Magistrate was listed as a lawyer in the then current alphabetical Manhattan telephone directory, with an office in the skyscraper office building. This petition was dismissed by the Appellate Division (not denied). New York City Magistrates are prohibited from practicing law and the listing in the telephone book was thereafter removed. Your petitioner also brought on a motion on the same day in the same Appellate Division, to remove Mr. Justice Keyes Winter, a Justice of the Municipal Court of the City of New York, on the ground that the said Justice changed the minutes of the trial of a dispossess proceeding that was on appeal so as to include words that were not spoken at the trial and vital exhibits that were not received in evidence at the trial.

Neither the Judge nor the Magistrate interposed any statement of their own in answer to the removal petitions of your petitioner but an Assistant Corporation Counsel of the City of New York interposed his own affidavits in opposition.

The respondent served thereafter a supplemental petition containing another charge of abuse of process based on the Magistrate Court summonses and petitions to remove the Judge and Magistrate. The Appellate Division referred the respondent's petition and supplemental petition to Hon. David L. Weil, an official Referee to hear and report together with his opinion. Hearings were held before the Official Referee on respondent's petitions and he filed his report on October 18, 1951. On October 30, 1951 your petitioner moved in the Appellate Division to dismiss the charges contained in the petition and in the supplemental petition. The respondent submitted nothing in opposition, but requested and received two weeks in which to file papers in opposition to your petitioner's motion.

Instead of submitting within two weeks papers in opposition to your petitioner's motion to dismiss, the respondent brought on a motion on or about November 5, 1951, returnable on the next motion day, November 13, 1951, wherein it recited that it is moving upon the "petition" and answer herein the report of the Official Referee and the evidence "adduced before him and on all papers and proceedings had herein, that the Referee's report be not affirmed, and that the respondent be adjudged guilty of professional wrongdoing as charged." More than two months later, respondent filed a printed brief with that Court on the very first page of which it said "Petitioner moves for discipline of respondent on the record and the evidence offered." It also said on the first page that "the Official Referee has filed his report in which he virtually exonerates respondent, although he states that some of his conduct is to be condemned." In its brief, however, the respondent argued as though its motion, returnable November 13th, was both on the petition and supplemental petition and not merely on the petition. In its brief it dropped a second charge contained in the original petition not connected with the Singer litigation and stated that it will not contest the report of the Official Referee in your petitioner's favor on that charge. On April 21, 1953 the Appellate Division made an order finding the petitioner guilty of professional misconduct and severely censuring your petitioner, which order recited that it was made on both the petition and supplemental petition of the respondent and on the exhibits "offered" in evidence and on the motion of the respondent.

All the findings of fact and conclusions of law made by the Referee were in favor of your petitioner except the conclusion of law unsupported by any finding in relation to the supplemental petition which read "While his conduct is to be condemned, I do not believe it was an abuse of process." The Appellate Division did not reverse any of the findings of the Official Referee. The only charges

arising after petitioner was evicted from his office were the proceedings that he brought in the Appellate Division to remove the Magistrate and the Municipal Court Justice. All other charges were based on acts occurring prior to his eviction from his office space. It would therefore seem from the opinion of the Appellate Division that petitioner was found guilty only in seeking to remove the judges.

The Referee found that there was "no evidence" to support the charge of abuse of process in the respondent's petition. In effect he so found as to the supplemental petition but did not use those words. The respondent offered absolutely no evidence on the Crawford matter or the Magistrate. The only evidence received as to the removal of the Municipal Court Justice was given by the stenographer of the said Municipal Court Justice and he testified that the minutes that he prepared of that trial were correct. Therefore there were no "mistakes in the stenographic minutes" for the Municipal Court Justice to correct. The testimony given by Clark before the Referee was clearly sufficient to sustain the charge of perjury against Clark. In its printed brief to the Appellate Division, the respondent said that its charge as to the Clark matter was not perfectly proved because the Referee erroneously struck out testimony of a carpenter. In any event the Referee did not find that there was no basis for charging Mr. Clark with perjury or for seeking the removal of Justice Winters. (See cross examination of Clark.)

In its brief, respondent also said "In order that this Court may rule on the admissibility and materiality of those excluded minutes, we are submitting them herewith (Pet. Exs. 6, 13, 14 and 17 for Identification)." The Court when it made its order severely censuring your petitioner, recited that the order is made upon "* * * and the exhibits offered in evidence."

The petitioner contending there were constitutional questions involved appealed to the Court of Appeals. The respondent moved to dismiss the appeal on the ground that no constitutional questions were involved. The Court of Appeals granted its motion on November 20, 1953. The Court of Appeals also denied petitioner's motion for leave to appeal as did the Appellate Division.

In his brief in the Appellate Division for leave to appeal to the Court of Appeals the petitioner said, "The Court inferentially has dismissed all the charges contained in the original petition." The respondent took no issue in its answering brief with that statement in petitioner's brief. In the Court of Appeals, however, respondent argued as if the Singer Co. charges in the petition were sustained by the Appellate Division.

Reasons for Granting the Writ

(1) The proceedings brought by the Bar Association against your petitioner insofar as it is based on your petitioner's attempt to remove judicial officers, is unique in legal history, as far as your petitioner can determine. There is no case that your petitioner knows where an attorney was made the subject of disciplinary proceedings because he brought a removal proceeding against a Judge before the body who has the power to remove the Judge. Many lawyers have been disciplined for criticizing the conduct of a Judge while before him, or in the newspaper or in some other way which did not give the Judge the opportunity to meet the charges, but it has been repeatedly said that the proper way, if a Judge is guilty of misconduct, is to bring a proceeding before his superiors or those who have the power to remove him. Canon No. 1 says that the one who does that "should be protected." Certainly in the case at bar where a landlord, who is somewhat of an in-

dustrial empire itself, and controlled by one of the richest families in the United States, makes a complaint about an attorney occupying 300 square feet of space through a firm of attorneys, one of whom was formerly the President of the respondent herein, this protection is an elementary requirement of justice. The Court below, not only severely censured your petitioner but it in effect enjoined him from engaging in any further crusades.

(2) The opinion of the Appellate Division stated that it is giving your petitioner "the benefit of the doubt." It is most respectfully stated that your petitioner is entitled as a matter of law to the benefit of the doubt, and since there was doubt, he could not have been found guilty of professional misconduct. A man cannot be found guilty where there is doubt and then be given a light or suspended sentence. Guilt of professional misconduct must have a firmer foundation than one made of doubt.

(3) All the charges in the supplemental petition were based on the contents of pleading and there was a finding that they were drawn "not with malice" but because of petitioner's "outraged feelings." The foundation of government under law is that it permits the pleading of outraged feelings in its courts.

(4) There is no underlying finding of fact which would support a conclusion of professional misconduct. The Court below quoted the words of the Referee "while his conduct is to be condemned, I do not believe it was an abuse of process." The Referee not only did not make any finding of fact that would support condemnation of the petitioner's conduct, but went on to say that petitioner's conduct was not "with malice" but solely due to the "petitioner's outraged feelings." As a matter of logic if the petitioner's conduct was not "an abuse of process" then there is no basis for condemning his conduct unless

there is present something reprehensible in place of the absent abuse of process. There is therefore nothing to support the order.

(5) The order below is in conflict with the decision of this Court in *Pennekamp* v. *Florida,* 328 U. S. 331; *Craig* v. *Harney,* 331 U. S. 367. It is in conflict with *Matter of Rotwein,* 291 N. Y. 116. It is in conflict with its own decisions during the Seabury Investigation where the same court made an order on June 25, 1931 removing Magistrate Jean H. Norris partly for changing stenographic minutes. The said order appears at page 242 of the final report of Honorable Samuel Seabury, dated March 28, 1932. The said printed volume also contains on page 249 an order removing Magistrate Jesse Silverman in part for dismissing complaints after hearing where the defendant should have been held. The magistrate that petitioner sought to remove did not even bother taking testimony on summonses issued by another magistrate and his name was listed as a lawyer in the then current alphabetical telephone directory. The order relating to Magistrate Silverman appeared on the front page of the New York Law Journal on July 3, 1931.

(6) If the Appellate Division made the order on evidence rejected by the Referee then its order is in conflict with the decision of this court in *Saunders* v. *Shaw,* 244 U. S. 317. Petitioner was not even given an opportunity to be heard on this new "evidence."

Conclusion

The order censuring petitioner is not supported on its face by the findings of the court below or of the Referee, and is therefore invalid. The making of scapegoats is not

in our traditions. The order is so obviously wrong that the court might grant this petition and reverse immediately. In any event this petition for a writ of certiorari should be granted.

February 16, 1954.

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APPENDIX

Portion of the Report of the Referee

Thereafter by an order dated January 31, 1951, I was appointed Referee to take testimony in regard to the supplemental charges and report with my opinion. Hearings were had, the petitioner appearing by George G. Hunter, Jr., Esq., the respondent attorney appearing in person. The testimony was mainly directed to the charges that had been made against Crawford and Clark in the Magistrate's Court. The proceedings were had before Magistrate Andrews and after a brief hearing they were dismissed (Pet. Ex. 26). Based on the dismissal of the charges, the respondent made an application to this Court for the removal of the Magistrate; that application was by an order of this Court dated October 18, 1950, dismissed. He also made an application for the removal of Mr. Justice Winters, who tried the dispossess case. In his petition for the removal of the Justice he sets forth a number of reasons in support of his application, which this Court has already passed upon, as appears from an order dated October 18, 1950, denying the application (Pet. Ex. 32).

The entire situation apparently is the result of the bitterness caused by the institution of proceedings to remove the respondent as a tenant from an office that he had been occupying. This respondent impresses me as very excitable and emotional. He acted as his own attorney throughout, and in my opinion felt that he was being wronged and was justified in taking the proceedings as above set forth. While his conduct is to be condemned, I do not believe it was an abuse of process.

It is my opinion his persistence in bringing the charges against Clark, Crawford and the two judges was annoying, but it was not with malice, and it was solely due to the respondent's outraged feelings.

Respectfully submitted,

DAVID L. WEIL,
Official Referee.

Dated, Oct. 11th, 1951.

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BRIEF FOR RESPONDENT IN OPPOSITION

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